

Copyright Case Update 2008

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Intellectual Property Institute
November 6, 2008

COBLENTZ,
PATCH, DUFFY
& BASS LLP ATTORNEYS
AT LAW

Originality of Authorship

***Meshwerks, Inc. v Toyota Motor Sales USA, Inc.,*
528 F3d 1258 (10th Cir. 2008)**



Originality of Authorship

***Meshwerks, Inc. v Toyota Motor Sales USA, Inc.,*
528 F3d 1258 (10th Cir. 2008)**

Q: Do digital models have sufficient originality to be protectable?

- **Tape on cars in grid pattern; file of data points created through mechanical arm w/ computer**
- **80-100 hours for each model**
- **Altered 90% of data points to get model close to original**

Originality of Authorship

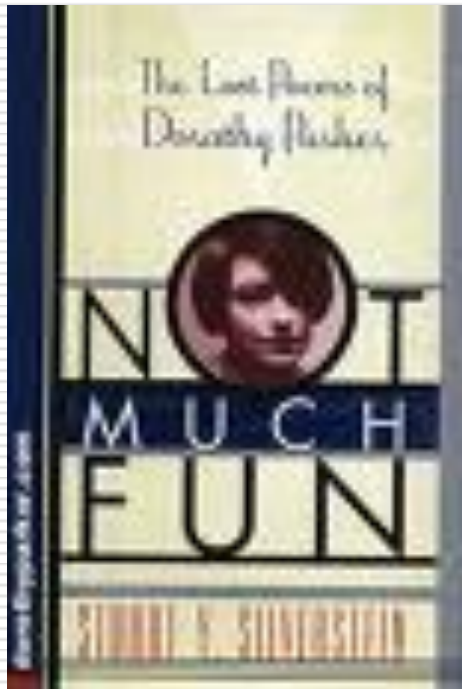
***Meshwerks, Inc. v Toyota Motor Sales USA, Inc.*,
528 F3d 1258 (10th Cir. 2008)**

Tenth Circuit: NO

- Under *Feist*, Meshwerks' labor insufficient basis for copyright protection
- Models "not so much independent creations as (very good) copies of Toyota's vehicles"
- Models depict nothing more than unadorned Toyota vehicles; change of medium does not equal creativity

Originality of Authorship

***Silverstein v Penguin Putnam, Inc.*, 522 F. Supp. 2d 579 (S.D.N.Y. 2007)**



Originality of Authorship

***Silverstein v Penguin Putnam, Inc.*, 522 F. Supp. 2d 579 (S.D.N.Y. 2007)**

Silverstein Criteria:

- 1. A poem or verse**
- 2. Authored by Parker**
- 3. Not previously published**

Court: Compilation must be governed by principles of selection other than all inclusiveness

No Atty's Fees to Penguin

Derivative Works

101:

A “derivative work:”

A work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation or any other form in which a work may be recast, transformed or adapted.

A work consisting of editorial revisions, annotations, elaborations or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’

Derivative Works

***Schrock v. Learning Curve Int'l.*, 531 F. Supp. 2d 990 (N.D. Ill. 2008)**



Derivative Works

***Schrock v. Learning Curve Int'l.*, 531 F. Supp. 2d 990 (N.D. Ill. 2008)**

Photographs are derivative works, as they were two-dimensional reproductions of three-dimensional copyrighted works;

The party seeking to copyright a derivative work must have the permission of the copyright holder of the underlying work

Derivative Works

***Latimer v Roaring Toyz, Inc.*, U.S. Dist. LEXIS 60018, August 7, 2008 (M.D. Fla.)**



Derivative Works

***Latimer v Roaring Toyz, Inc.*, U.S. Dist. LEXIS 60018, August 7, 2008 (M.D. Fla.)**

Photographs not derivative works, because they did not recast or otherwise transform the original work;

The motorcycles are the subject of the photographs; Hathaway's artwork has not been transformed in the slightest; it is presented in a different medium, but it has not been changed in the process such that it meets the criteria for a derivative work under copyright law.

Infringement: Direct & Contributory Liability

Perfect 10, Inc. v. Amazon, Inc., 508 F.3d 1146 (9th Cir. 2007)



Naureen Zaim Perfect 10 Model
Boxing ...
376 x 490 - 40k - jpg
goceleb.blogspot.com
[More from images.askmen.com]



Perfect 10 Models 1918-Maya (1)
499 x 331 - 21k - jpg
www.perfect-10-models.com
[More from www.perfect-10-models.com]



... one of its Perfect 10 models.
533 x 291 - 26k - jpg
abagond.wordpress.com



Perfect 10 Magazine sues Amazon
for ...
394 x 500 - 46k - jpg
www.schwimmerlegal.com
[More from
www.schwimmerlegal.com]



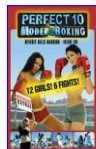
Perfect 10 Models DSC_1949.
331 x 499 - 25k - jpg
www.perfect-10-models.com



THE Perfect 10 Tel Aviv-Israel
300 x 446 - 55k - gif
profile.myspace.com



The Perfect 10: Model Boxing's ...
376 x 490 - 49k - jpg
goceleb.blogspot.com



Perfect 10 Model Boxing
Beverly ...
355 x 500 - 54k - jpg
selahoolilyf.blogspot.com



Perfect 10 takedown demand to
Google ...
195 x 255 - 24k - jpg
www.schwimmerlegal.com



Articles On Perfect 10 Model
Boxing ...
600 x 631 - 85k - jpg
www.bargainmegashop.com



Who I'd like to meet:
1024 x 334 - 11k - gif
profile.myspace.com



1 Perfect 10 Model Boxing
Beverly ...
285 x 400 - 25k - jpg
www.bargainmegashop.com



1 Perfect 10 Model Boxing
Beverly ...
310 x 300 - 19k
www.bargainmegashop.com



::Welcome to PERFECT 10
Model ...
325 x 424 - 85k - gif
www.modelboxing.com



Perfect 10 Models DSC_1965.
499 x 331 - 31k - jpg
www.perfect-10-models.com



Perfect 10 Model Search -
Local ...
400 x 309 - 33k - jpg
profile.myspace.com



Perfect 10 was an adult men's ...
410 x 230 - 17k - jpg
www.askmen.com



Top 10 Models of Right Now
640 x 473 - 92k - jpg
keepingittpp.wordpress.com

Infringement: Direct & Contributory Liability

Perfect 10, Inc. v. Amazon, Inc., 508 F.3d 1146 (9th Cir. 2007)

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Abagond
Five hundred words a day on whatever I want

Mon 3 Dec 2007

Adriana Lima
Posted by abagond under 1990s, 2000s, beauties, brazil, models



Adriana Lima (1981-) is a **Brazilian supermodel**. Among Brazilian models only Gisele Bundchen makes more money. Lima is best known as a model for **Victoria's Secret**. She is one of its "angels", one of its Perfect 10 models. In 2003 she opened its television show.

In North America she is better known than the president of Brazil or her home city of Salvador in Bahia.

Archived Entry

Post Date :
Mon 3 Dec 2007 at 05:18:20

Category :
1990s, 2000s, beauties, brazil, models

Do More :
You can leave a response, or trackback from your own site.

Infringement: Direct & Contributory Liability

***Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146 (9th Cir. 2007)**

- Thumbnail images of Perfect 10's works, taken from infringing third party sites and stored on Google's servers, directly infringed Perfect 10's display right
- However, Google's use = TRANSFORMATIVE in using thumbnails as reference tool
- Google likely to succeed on Fair Use defense

Infringement: Direct & Contributory Liability

***Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146 (9th Cir. 2007)**

- Framing of in-line linked full-size images do not directly infringe, where images are stored on 3rd party servers
- Google did not make or display a “copy” of the images for purposes of Copyright Act, even though Google code caused images residing on third party servers to be displayed in Google framing
- No vicarious liability where Google lacked control over direct infringers or technology to police 3rd party sites

Infringement: Direct & Contributory Liability

***Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146 (9th Cir. 2007)**

- Potential contributory liability if Google knew that infringing images were available to search engine users and could, but failed to, take simple preventive measures

Infringement: Substantial Similarity

***Zella v. The E.W. Scripps Co.*, CV 06-7055 ABC
(JTLx) (C.D. Cal. 2008)**



Infringement: Substantial Similarity

***Zella v. The E.W. Scripps Co.*, CV 06-7055 ABC
(JTLx) (C.D. Cal. 2008)**

Q: Substantial Similarity in Protectable Elements?

- Court took judicial notice of and disregarded common and prevalent elements of live TV shows:
 - hosts, celebrity guests, interviews
 - and cooking segments
- No substantial similarity w/ regard to protectable elements:
 - characters, dialogue, moods, pace, plots,
 - sequences, settings and themes

Infringement: Distribution Right

The “Making Available” Split

Among the Exclusive Rights of a Copyright Owner:

106 (3):

to distribute copies of the work by sale or other transfer of ownership, or by rental, lease, or lending

Infringement: Distribution Right

The “Making Available” Split

“Distribution” not defined in CR Act;

“Publication:”

The distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance , or public display, constitutes publication....” 101 (emphasis added)

Infringement: Distribution Right

The “Making Available” Split

Elektra Entertainment Group, Inc. v. Barker,
551 F. Supp. 2d 234 (S.D.N.Y., March 31, 2008)

“Distribution” in CR Act synonymous w/ “publication,” so making file available is sufficient *if* coupled w/ *offer* to distribute

Atlantic Recording Corporation v. Howell,
554 F. Supp. 2d 976; (D.Ariz., April 29, 2008)

Section 106(3) requires actual distribution of unauthorized copy; making copy available is not sufficient.

Infringement: Secondary Liability

***The Cartoon Network, LP, LLLP, et al. v. CSC Holdings, Inc., et al., 536 F.3d 121; 2008
(2d Cir. 2008)***

- **Transmitted digital data divided in two: one stream of data broadcast in real-time; second stream of data buffered, reformatted, stored; sent to subscriber upon request**
- **Plaintiffs: Infringement when programs buffered; when copied to server for storage; and when played back**

Infringement: Secondary Liability

***The Cartoon Network, LP, LLLP, et al. v. CSC Holdings, Inc., et al., 536 F.3d 121; 2008
(2d Cir. 2008)***

Court: No direct infringement:

- **1.2 second presence of data when buffered = transitory;**
- **Materials copied onto Cablevision servers made at request of subscribers, not Cablevision; no volitional conduct**
- **Delivery to subscribers not public performance**

Potential contributory infringement; but not alleged.

Infringement: Secondary Liability

***Perfect 10, Inc. v Visa Int'l Serv. Ass'n*, 494 F.3d 788 (9th Cir. 2007), cert denied, 128 S. Ct. 2871 (2008)**

Q: Can credit card companies , affiliated banks and data processing services be secondarily liable for CR infringement by processing credit card payments to websites that infringe copyrights?

Ninth Circuit: As a matter of law: NO

Infringement: Secondary Liability

***Perfect 10, Inc. v Visa Int'l Serv. Ass'n*, 494 F.3d 788 (9th Cir. 2007), cert denied, 128 S. Ct. 2871 (2008)**

No contributory infringement:

- Payment systems did not help locate infringing images; or provide site, facilities or centralized location for infringing images

No inducement liability:

- No affirmative steps to foster infringement; no promotion of payment systems as means to infringe
- That services made infringement more profitable not sufficient to create liability

Infringement: Secondary Liability

***Perfect 10, Inc. v Visa Int'l Serv. Ass'n*,
494 F.3d 788 (9th Cir. 2007), cert denied,
128 S. Ct. 2871 (2008)**

No vicarious liability:

- No right or ability to supervise and control infringing activities

Kozinski Dissent:

Payment processing = essential step in infringement process that constitutes “active participation in infringing conduct”

Licenses

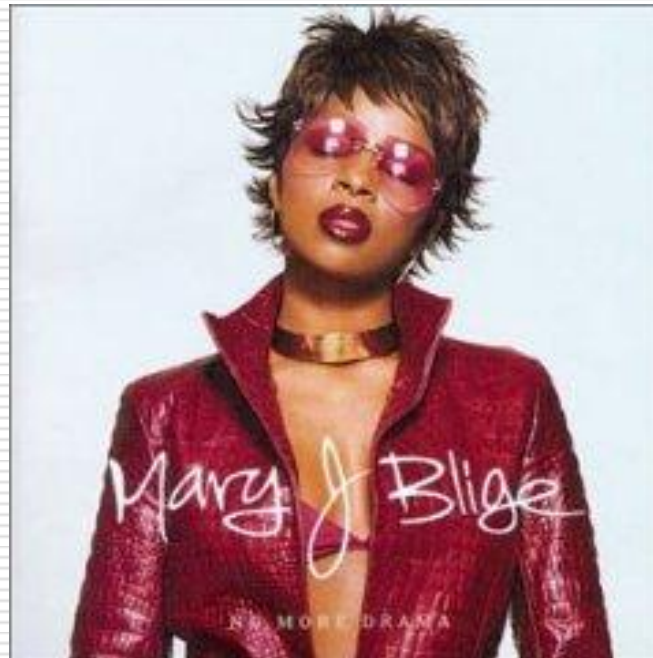
***Sybersound Records Inc. v. UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008)**

Single co-owner of a copyright can grant nothing more than a non-exclusive license;

Non-exclusive licensee does not have standing to sue.

Licenses

***Davis v. Blige*, 505 F.3d 90 (2d Cir. 2007)**



Licenses

***Davis v. Blige*, 505 F.3d 90 (2d Cir. 2007)**

Davis alleged that rights as co-owner of songs were infringed;

Day before being deposed, Davis's co-owner retroactively transferred interest to co-defendant Miller, who licensed song to Blige.

Court:

- A license or assignment in copyright can only act prospectively;
- A co-owner could have licensed use initially, cannot retroactively authorize use to defeat infringement claim by co-owner.

Termination of Licenses

***Penguin Group (USA), Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008)**

Section 304(c):

Authors or their statutory heirs may terminate pre-1978 grants through notice during 5 year period, “notwithstanding any agreement to the contrary.”

Widow’s 1994 agreement not “agreement to the contrary” but valid new agreement;

Renegotiation exhausted heir’s statutory termination rights in 1938 agreement.

License v. First Sale

Vernor v. Autodesk, Inc., 555 F. Supp. 2d 1164 (W.D. Wash. 2008)

- Subsequent purchaser of copies of software had right to resell under First Sale doctrine, despite license language to the contrary

***UMG Recordings, Inc. v Augusto*, 558 F. Supp.2d 1055 (C.D. Cal. 2008)**

- Mailing of promotional music CDs transferred title so that First Sale doctrine inapplicable, despite licensing language on CDs prohibiting resale

Defenses: Fair Use

***Lennon v. Premise Media Corp, L.P.*, 556 F.Supp.2d 310 (S.D.N.Y. 2008)**



Defenses: Fair Use

***Lennon v. Premise Media Corp, L.P.*, 556 F.Supp.2d 310 (S.D.N.Y. 2008)**

Fair use defense likely to succeed:

- Song used “for purposes of criticism and commentary” to criticize Lennon’s positive view of world w/o religion**
- Creative nature of song entitled to little weight where use is transformative**
- Portion used reasonable for film’s purpose**
- No evidence that use of song was threat to song’s commercial value**

Defenses: Fair Use

***Warner Bros. Entertainment v. RDR Books et. al*,
2008 U.S. Dist. LEXIS 6771 (S.D.N.Y. 2008)**



Defenses: Fair Use

***Warner Bros. Entertainment v. RDR Books et. al*, 2008 U.S. Dist. LEXIS 6771 (S.D.N.Y. 2008)**

1. HP Lexicon substantially similar to Rowlings' works:

Rowlings' "facts" = highly protected expression

" Even if expression is or can be used in its 'factual capacity,' it does not follow that expression thereby takes on the status of fact and loses its copyrightability."

2. HP Lexicon not a derivative work:

Companion guides not derivative works where do not recast material in another medium to tell the same stories; instead, gives the CR'd material another purpose; Lexicon no longer 'represents [the] original work[s] of authorship."

Defenses: Fair Use

***Warner Bros. Entertainment v. RDR Books et. al*, 2008 U.S. Dist. LEXIS 6771 (S.D.N.Y. 2008)**

3. BUT: D's use not Fair Use:

- Lexicon transformative re: novels, but only slightly
transformative re Rowlings' reference companion books
Lack of criticism or commentary does not preclude
transformative nature
- Amount of verbatim copying diminished transformative
nature
- Lexicon likely to impair sales of Rowlings' companion
books

Remedies: Damages

***Derek Andrew Inc. v Poof Apparel Corp.*, 528 F.3d 696 (9th Cir. 2008)**

412(2):

...no award of statutory damages or of attorney's fees...shall be made for –

---any infringement of copyright commenced after first publication of the work and before the effective date of its registration...

Remedies: Statutory Damages

Derek Andrew Inc. v Poof Apparel Corp., 528 F.3d 696 (9th Cir. 2008)

- Andrew learned of Poof's use on 5/9/05
 - Sent C&D on 5/17/05
 - Registered label on 6/15/05
- Poof's use continued; Andrew filed suit; Poof defaulted;
 - Andrew awarded damages and fees
- On appeal of damages: No Statutory Damages
 - Poof's continued distribution of infringing goods after registration
 - Date = part of same ongoing conduct, commenced before regis.

Remedies: Attorney's Fees

7th Circuit leads in generous atty's fees:

***Mostly Memories, Inc. v. For Your Ease Only*, 526 F.3d 1093 (7th Cir. 2008):**

"Strong presumption" that prevailing party awarded atty's fees; plaintiff's claim need not be "sanctionable" for fees to be awarded

***Riviera Distributors, Inc. v Jones*, 517 F.3d 926 (7th Cir. 2008):**

Plaintiff dismissed claims: Award of fees to prevailing party does not require ruling on merits

Communications Decency Act: Web Site Liability

Fair Housing Council of San Fernando Valley, et al. v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008)

Roommates.com The Web's Most Popular Roommate Matching Service

[Home](#) [Get Started](#) [Preview](#) [More Info](#) [Dating](#) [Member Login](#)


QuickView

I NEED a room
Select state...
Enter city...
[Search Canada...](#)

Member Login

Nickname:
Password:
☐ Remember me
[Login assistance...](#)

October 22nd: 121,885 Roommates Available




Roommates.com is a roommate finder and roommate search service which covers thousands of cities nationwide. Currently, Roommates.com is the Web's most popular roommate matching service, receiving over 50,000 visits and 1,000,000 page views per day. Let us help you find the perfect roommate.
[Become a member now...](#)

Free Photo Profile
Free 2-Way Matching
Free Power Roommate Search
Free to Contact Potential Roommates

join...>
FOR FREE

Roommate Pick



Lindsey S.
Scottsdale, AZ
I am looking for someone who is responsible and trustworthy that I can still enjoy living with...

What they're saying:

Three cheers for Roommates.com! I found the most ideal roommate in less than ONE WEEK! I cannot thank you enough for saving me so much time and effort! I was concerned about displaying filters in public places because I had no idea who would be calling and how safe it would be to interview potential roommates. Your website made me feel secure in my search! Thank you, thank you, thank you!!!! I still can't believe how easy it all was! - Caroline

[More testimonials](#)

Popular US cities: [San Diego](#), [New York](#), [Atlanta](#), [Orlando](#), [Austin](#), [Phoenix](#), [Chicago](#), [Boston](#), [Las Vegas](#), [Houston](#), [Los Angeles](#), [Denver](#), [Charlotte](#), [Tampa](#), [Dallas](#), [San Jose](#), [Seattle](#), [Miami](#), [Sacramento](#), [Minneapolis](#), [Jacksonville](#), [Mesa](#), [Columbus](#), [Raleigh](#), [Portland](#), [Brooklyn](#), [Philadelphia](#), [Scottsdale](#), [Fort Lauderdale](#), [Indianapolis](#), [Chandler](#), [Alexandria](#), [San Antonio](#), [Tucson](#), [Nashville](#), [Irvine](#), [Baltimore](#), [Somerville](#), [Tallahassee](#), [San Francisco](#), [Salt Lake City](#), [Colorado Springs](#), [Pittsburgh](#), [Fairfax](#), [Gainesville](#), [Marietta](#), [Arlington](#), [Washington](#), [Huntington Beach](#)

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©2000-2008 Roommate.com, LLC.

[Link](#)

Communications Decency Act: Web Site Liability

Fair Housing Council of San Fernando Valley, et al. v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008)

Section 230:

"[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

[47 U.S.C. 230\(c\)\(1\).](#)

"Information content provider" = "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other" ICS.

[47 U.S.C. 230\(f\)\(3\).](#)

Communications Decency Act: Web Site Liability

Fair Housing Council of San Fernando Valley, et al. v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008)

- **No immunity for directly-provided content:
i.e., questionnaires; menus**
- **No immunity for collaboratively-developed content
i.e. profile pages**
- **Immunity for content entered solely by users**
 - **i.e. “additional comments” section**

Communications Decency Act: Web Site Liability

Fair Housing Council of San Fernando Valley, et al. v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008)

- No liability for content-neutral or *de minimis* editorial conduct
- Immunity for UGC limited to content tendered to Service provider for publication
- Immunity for UGC, even where service provider provides drop down menus, etc., where not relation to any alleged illegality
- Immunity to service providers in close cases